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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 283.

ALLEN T. SIMMONS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, THE WGAR BROADCASTING COMPANY, *Respondents*.

In Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION TO DESIGNATE "THE WGAR BROADCASTING COMPANY" AS A PARTY RESPONDENT.

BRIEF FOR THE WGAR BROADCASTING COMPANY IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1948.

No. 232.

ALLEN T. SIMMONS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, THE WGAR BROADCASTING COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION TO DESIGNATE "THE WGAR BROADCASTING COMPANY" AS A PARTY RESPONDENT.

The WGAR Broadcasting Company, a corporation, moves that the heading of the above described petition for writ of certiorari be amended by the addition of "The WGAR Broadcasting Company" as a party respondent thereto and, in support thereof, states:

The above petition for writ of certiorari, in omitting to name "The WGAR Broadcasting Company" as a party to this proceeding, does not conform with the heading to the decision of the United States Court of Appeals for the District of Columbia for a review of which the above petition for writ of certiorari is filed (R. 162-165).

The WGAR Broadcasting Company is an interested party in this proceeding, having intervened and partici-

pated therein before the United States Court of Appeals for the District of Columbia pursuant to Section 402(d) of the Communications Act of 1934, as amended, and, by Section 402(e) of said Act, is an interested party to the review of such decision by the Supreme Court of the United States upon petition for writ of certiorari under Section 240 of the Judicial Code, as amended, in that the objective of such petition for writ of certiorari is to reverse the decision of the Court below which dismissed petitioner's appeal from the Federal Communications Commission's grant of the WGAR Broadcasting Company's application for increase in power, and which affirmed the Federal Communications Commission's decision denying petitioner's application for the assignment to him of the radio frequency previously licensed to The WGAR Broadcasting Company.

WHEREFORE, The WGAR Broadcasting Company respectfully requests that it be designated as a party respondent in this proceeding, and be granted leave to file a brief in opposition to the above-described petition and such other relief as may be proper.

THE WGAR BROADCASTING COMPANY,

By .....
LOUIS G. CALDWELL

.....
DONALD C. BEELAR

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PERCY H. RUSSELL, JR.
914 National Press Building
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Its Attorneys.

Subject to the granting of the above motion, The WGAR Broadcasting Company herewith submits for consideration its brief in opposition to the above described petition for writ of certiorari.

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OPINIONS BELOW.

The decision of the Court below (R. 162-165) dated May 24, 1948 is not yet reported. The decision of the Federal Communications Commission entered April 25, 1947 (R. 120-146) and its opinion and order entered June 28, 1948 denying petition for rehearing (R. 155-160) are not yet reported.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended, and under Section 402 (e) of the Communications Act of 1934, as amended.

QUESTION PRESENTED.

Whether the Commission may deny an application for a radio broadcasting station license to an applicant who is requesting the assignment to himself of a radio frequency which is presently licensed to an existing radio broadcasting station, which would have to be displaced from its assignment if such application were granted, where the applicant's affirmative showing on the public service features made in support of such application is merely that, if granted the authorization, he proposes voluntarily to broadcast exclusively 100% of the network programs originated by one national network organization to the exclusion of any local program service after 8:00 A.M. of each broadcast day and night.

SUMMARY STATEMENT.

Petitioner now is and for a number of years has been licensee of radio station WADC at Akron, Ohio, operating on 1350 kc and his status as such licensee is no way involved in the issues of this proceeding. At the time Petitioner filed his instant application with the Federal Communications Commission (herein referred to as "Commission") on October 8, 1945, requesting a change in frequency assignment from 1350 kc to 1220 kc, the latter frequency 1220 kc was then licensed to and in regular use at Cleveland, Ohio by The WGAR Broadcasting Company (referred to herein as "WGAR") pursuant to an earlier decision of the Commission rendered November 3, 1943, 10 FCC 222.

The frequency 1220 kc first became available for assignment in the Cleveland area of the United States in 1941 following an Executive Agreement (Series 196) between the Republic of Mexico and the United States and several international conferences thereunder. At that time Cleveland, Ohio was the sixth largest city and the tenth metropolitan district of the United States but it had only four radio stations, one of which was limited to daytime opera-

tion. WGAR operated one of the three full-time stations but its frequency assignment and power limitation was such that its coverage was inadequate and its signal was sufficient to provide good reception to less than 50% of the greater Cleveland area. In February 1941 when the frequency 1220 kc became available, WGAR promptly filed its application therefor. Petitioner, then the licensee of station WADC at Akron, Ohio sometime later filed for this frequency, 1220 kc. The two applications of WGAR and of Petitioner, each requesting the original assignment of 1220 kc in substantially the same area, were consolidated for hearing. Both parties participated in such hearing before the Commission on June 22-25, 1942. This proceeding resulted in a grant of the WGAR application and a denial of Petitioner's application by the Commission's decision of November 3, 1943, 10 FCC 222, which decision was affirmed on appeal taken by Petitioner. *Simmons* v. *Federal Communications Commission,* 145 F. 2d 578. There is no question but what Petitioner had a full and fair hearing before the Commission in the original assignment of 1220 kc to WGAR.

The original license of this frequency granted to WGAR was subject to a condition "that applicant shall take whatever steps are necessary to improve the signal of WGAR over the Cleveland business district to comply with the Commission's rules and regulations when materials and equipment again become available for construction of broadcast facilities." When the freeze on such critical materials was modified, the Commission, on July 24, 1945, sent a letter to WGAR calling its attention to the above quoted condition in its license and directed it to take necessary steps to improve its signal in the Cleveland area. Following procedure logically indicated, WGAR on August 23, 1945 filed its application for increase in power on its present frequency assignment to 50 kw. One month and a half later, Petitioner on October 8, 1945, applied for the assignment to him of the frequency then licensed to WGAR,

which he had been denied in the original proceeding. The two applications were heard in a consolidated hearing held April 24-26, 1946 in which Petitioner had a full and fair hearing and he makes no contention that the findings of fact are not in accordance with and supported by the evidence presented. Petitioner's presentation before the Commission, before the Court below, and in the instant petition for a writ of certiorari is based on an erroneous assumption that WGAR's action in applying for an increase in power on its existing frequency assignment in compliance with the condition of its license, opened up the original proceeding *de novo*. Petitioner does not contend that he is legally aggrieved or adversely affected by the Commission's grant of an increase in power to WGAR on its presently licensed assignment. Petitioner's interest is not based on his status as an existing licensee. Petitioner's position in this proceeding is based solely on his status as an applicant for the assignment to himself of the radio frequency licensed to WGAR. There is no question as to the facts or as to the adequacy or correctness of the Commission's findings. The single question is one of law, i. e., whether the Commission may deny an application for the license of a radio frequency assigned to another and refuse even to consider taking away or compulsorily modifying the license of the existing station which is admittedly rendering meritorious service in the public interest, when such applicant has nothing better to offer than a bizarre program policy of broadcasting exclusively 100% of the network programs of one national network organization.

ARGUMENT.

A. Petitioner Failed to Sustain Required Burden of Proof.

Quite regardless of what radio program service petitioner proposed to broadcast or not to broadcast, he brought upon himself, by seeking to displace another radio broadcasting station from its existing radio frequency as-

signment, the burden of establishing affirmatively compelling reasons in the public interest for such drastic action. *Chicago Federation of Labor* v. *F. R. C.*, 41 F. 2d 422, 423; *Journal Co.* v. *F. R. C.*, 48 F. 2d 461, 463; *In Re U. S. Broadcasting Corp.*, 2 FCC 208, 236; *In re Peoria Broadcasting Company*, 1 FCC 167. See *Ashbacker Radio Corp.* v. *F. C. C.* 326 U. S. 327, 332. The above proposition is stated in the cited cases as follows:

> "It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest and necessity are the paramount considerations." *Chicago Federation of Labor* v. *F. R. C., supra.*
>
> "The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons. Chicago Fed. of Labor v. Fed. Radio Comm., 59 App. D. C. 333, 41 F. (2d) 422. Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons." *Journal Co.*, v. *F. R. C., supra.*

> "Although the law expressly negatives a vested right in any licensee to the use of any particular frequency as against the reasonable regulatory powers of the government, the Federal Radio Commission early in its administration enunciated the principle that true public interest requires that existing stations should not be deprived of broadcasting privileges unless sound reasons of public policy demand such action. The United States Court of Appeals for the District of Columbia in Chicago Federation of Labor v. Federal Radio Commission, 59 App. D. C. 333, approved this principle. We recognize also that the principle is predicated upon the proposition that the existing station is doing as good or better job than a new applicant can or will do." *In re U. S. Broadcasting Corp., supra.*

The reasoning in the above cases is supported inversely by the decision in *Ashbacker Radio Corp.* v. *F. C. C., supra,* in requiring two applicants for mutually exclusive facilities to be accorded opportunity for hearing prior to the grant of either application.

In this case Petitioner made no attempt to meet such burden of proof. Instead the case he presented before the Commission was based on a misconception that, if an existing licensee applies for an increase in power on its present assignment, the frequency reverts to "public domain" and is opened up for application to all comers on a competitive basis as in the case of an original assignment of a radio frequency not theretofore in use. Petitioner presented no evidence attempting to disprove that the service being rendered by WGAR is in the public interest. Petitioner did not except to the findings of fact by the Commission on the meritorious service being rendered by WGAR (R. 134-135). Petitioner failed to establish any facts or initiate any procedure warranting Commission action of displacing WGAR from its existing frequency assignment.

The point herein made is upheld in the concurring opinion of Mr. Justice Miller in the Court below (R. 164):

"I think the order refusing to grant a license to Simmons was properly entered by the Commission, but not for the reason assigned by it and approved by the court. Appellant's application could and should have been denied because it sought a license for a frequency already in use in the same area by the intervenor under an existing license, and no valid reason appeared for depriving the intervenor of that use."

The foregoing is a complete answer to Petitioner's fourth contention (pp. 16-18) with respect to comparative consideration. See *Simmons* v. *FCC, supra.*

B. The Commission's Decision Does Not Constitute Censorship or Abridgement of Petitioner's Freedom of Speech.

Since Petitioner did not meet or sustain the burden his application assumed of making out a case which would warrant his appropriation of the radio frequency assignment to WGAR, we believe that he has no standing to raise the above issue. On the facts of this case it is difficult to understand how Petitioner's right to freedom of speech is abridged by the Commission's denial of his application for WGAR's frequency. Insofar as the instant decision is concerned, Petitioner is left in status quo as the licensee of radio station WADC with freedom to choose what service he will or will not render. In presenting his case before the Commission, Petitioner by his own choice staked his success or failure on the startling policy of broadcasting exclusively 100% of the national network programs originated by one network organization. The Commission's findings of fact on this evidence are correct. The Commission's decision on these findings correctly concludes that, on the showing presented, a grant of Petitioner's application would not be in the public interest, even if he were the only applicant.

The Commission's decision holds that a radio station licensee must maintain himself free to choose or reject what programs he will or will not broadcast. Under the above

described program policy presented to the Commission, Petitioner denied to himself freedom to choose what programs he would accept or reject. His proposal involved a delegation of Petitioner's responsibilities to one national network organization. That is the essence of the Commission's decision. And that is the basis of its affirmance by the Court below. The basis of the Commission's decision therefore, instead of constituting censorship, actually affirms the essential freedom and responsibility of a licensee to determine for himself what programs he shall or shall not broadcast.

In *Voliva* v. *WCBD, Inc.*, 313 Ill. App. 177, 39 N. E. 685, 689, the plaintiff had a contract with the licensee to broadcast a certain program over WCBD. Because of controversial matter injected into the program, the licensee required the plaintiff to submit his program script to the station forty-eight hours in advance. Plaintiff brought suit to enjoin this action which was dismissed on appeal:

> "They (licensees) must necessarily be held responsible for all program service and may not delegate their ultimate responsibility for such to others."

In *McIntire* v. *Wm. Penn Broadcasting Company*, 151 F. 2d 597, 599, the Court on appeal affirmed the dismissal of a complaint brought by a religious organization against a radio station licensee for his cancellation of a contract for the broadcast over his station of programs by the religious organization. The Court, in its opinion, stated:

> "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC."

In *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, this Court, in its decision affirming the Chain Broadcasting Regulations of the Commission over various contentions

raised by National Broadcasting Co. and Columbia Broadcasting System, including the contention that these regulations abridge freedom of speech, adopted much of the language from the Commission's Report on Chain Broadcasting, excerpts from which, relevant to the policy question raised in this case, are as follows:

"'The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. (P. 199)

* * * * *

"'A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. (P. 203)

* * * * *

"'The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.'" (pp. 205-6)

In this case, Petitioner is placed in the anomalous position of having to admit (Petition, p. 12), by analogy of the *National Broadcasting Company case, supra,* that the Commission's action in denying him the right, if based on contract, to broadcast over his station 100% of the programs of one network, would not be censorship; whereas, denial of his application based upon a voluntary proposal (which, if his application were granted, would become a commitment to the Commission under the Commission's interpretation of its powers) to broadcast over his station 100% of the programs of one network, is censorship.

Whether the result is arrived at by contract with a network organization or by voluntary commitment to the Commission, the essential fact is that the licensee is not retaining unto himself the freedom to choose or reject what programs he shall broadcast.

The Commission, in its memorandum opinion on rehearing stated (R. 159):

> "It may be noted, for instance, that the Commission's decision in no way states what particular programs or types of programs WADC would have to put on the air before it could be considered to serve the public interest, nor is there a single word in the Commission's decision which would be taken as indicating a Commission prohibition on the broadcast of any particular program or type of program."

The above statement constitutes an administrative holding by the Commission that, in this case, it is not attempting to tell Petitioner what "programs or types of programs he may or may not broadcast". Petitioner's argument on that point therefore, however interesting it may be on the subject of censorship in general, misses the mark on the particular facts of this case. Accordingly no novel question of importance is presented by the instant petition.

CONCLUSION.

It is therefore respectfully submitted that the above petition for writ of certiorari should be denied.

Respectfully submitted,

THE WGAR BROADCASTING COMPANY,

By .....

LOUIS G. CALDWELL

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DONALD C. BEELAR

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PERCY H. RUSSELL, JR.
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Washington 4, D. C.
Its Attorneys.

Service of a copy of the foregoing motion and brief in opposition and receipt of a copy thereof is hereby acknowledged this ..... day of September, 1948.

Solicitor General

By .....

Federal Communications Commission

By .....

ALLEN T. SIMMONS

By .....